

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAUDIO TREJO)	
Claimant)	
VS.)	
)	Docket No. 1,055,058
HYDRO RESOURCES HOLDING, INC.)	
dba HENKLE DRILLING & SUPPLY, INC.)	
Respondent)	
AND)	
)	
UNION INSURANCE COMPANY OF PROVIDENCE)	
Insurance Carrier)	

ORDER

Claimant and Respondent requested review of the March 11, 2013, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 11, 2013.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The record was unclear whether claimant's last day with respondent was October 3, 2011 or October 4, 2011. At the oral argument to the Board, the parties agreed the appropriate date would be October 4, 2011. Additionally, the Award lists the temporary total disability (TTD) weekly payment amount as either \$456.00 or \$546.00. The parties agreed at oral argument to the Board, that the appropriate weekly rate, which was actually paid in this matter, is \$546.00 per week.

ISSUES

The ALJ found that, as a result of claimant's accidental injury, which arose out of and in the course of his employment on July 7, 2009, claimant has a 22 percent permanent partial functional impairment to the body as a whole. The ALJ found claimant's credibility to be questionable at best. Dr. Carabetta was found to be credible and reliable as the independent examiner, and his medical opinions regarding claimant's functional impairments were adopted. The ALJ denied claimant's request for a permanent partial general (work) disability, determining that claimant continued to make his pre-injury wage through October 4th, 2011. It was also noted that claimant was receiving unemployment benefits which claimant believed would terminate on or after December of 2012. The amount of unemployment benefits could not be determined as the record contained no information whether claimant's benefits were actually terminated. The Award goes on to rationalize that, as the amount of weekly unemployment benefits was unknown, the ALJ could not determine a wage loss from and after October 5th, 2011. Therefore, the ALJ found claimant was not entitled to a work disability award. Finally, the ALJ found claimant entitled to an unauthorized medical allowance not to exceed \$500.00, and awarded future medical treatment upon proper application to and approval by the Director of Workers Compensation.

Claimant argues that the Award should be modified to reflect a 35 percent impairment to the body as a whole and a 90 percent work disability from and after October 4, 2011, his last day worked for respondent, until such time as he may be engaged in work for wages equal to 90 percent or more of his average gross weekly wage at the time of his injury. Claimant also argued that, given his average weekly wage on the date of accident, he is entitled to a maximum temporary total disability rate of \$529.00 per week for a total of \$76,837.25, [sic] and a total award not to exceed \$100,000.00. However, it was noted at oral argument to the Board, the appropriate weekly benefit rate for claimant's July 7, 2010, date of accident would be \$546.00.

Respondent argues claimant is entitled to no more than a 15 percent permanent partial functional impairment to the left shoulder. If claimant is awarded a work disability, respondent contends that, based on *Bergstrom*,¹ claimant is prohibited from claiming a wage loss under K.S.A. 44-510e after October 4, 2011, claimant's last day of work for respondent.

The issue is as follows:

1. What is the nature and extent of claimant's injuries and disability, and more particularly, should claimant's award be limited to a left shoulder scheduled injury under

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

K.S.A. 44-510d, or is claimant entitled to a whole body functional impairment followed by a permanent partial general (work) disability under K.S.A. 44-510e?

FINDINGS OF FACT

Claimant testified with the aid of an interpreter, that he suffered injuries on July 7, 2009, after becoming dehydrated and losing control of his water tank truck, and ending up in a ditch after rolling the truck. Claimant alleges he suffered injuries to his left shoulder, back, neck, head, right knee and right ankle. Claimant received medical treatment in the form of left shoulder surgery and physical therapy. He also had an MRI of his head.

Claimant continues to have constant pain in his head and has difficulty sleeping at night. He takes medication for the pain, has problems with memory and gets dizzy. He had surgery to his left shoulder, but still has constant pain that goes up into his neck and down to his wrist. He has problems doing things with his left arm. He is unable to turn his head to either side. Claimant's low back pain causes him problems when riding in a car or lifting things. Claimant testified that his pain level is an 8 on a scale of 1-10.

Claimant rated his neck pain as an 8 out of 10, and he is unable to turn his head from side to side or to look up and down very far without pain or discomfort. Claimant rated his belt level back pain at a 7 out of 10. He is not able to lift or bend, walk or sit without pain. Claimant also complains of sharp pain in his right knee down to his right ankle. He rated his knee pain at a 7 out of 10.

Except when he was on TTD, claimant continued working for respondent for over two years at his regular job. Claimant testified he was given help with his work by the general manager, but his supervisor would take the help away and he would have to manage on his own. Claimant was found to be at maximum medical improvement in July 2010. His employment was terminated on October 4, 2011. Claimant worked for two weeks with Water Well Tyler in April or May 2012. He was let go from this job because of pain he had in his left wrist. He testified that the company didn't want any problems so they let him go after two weeks. He was paid \$18.00 per hour for 40 hours a week.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on September 6, 2011. Claimant presented with complaints of headaches; occasional memory loss; occasional dizziness; neck pain; left shoulder pain; a knot on right elbow; bilateral ankle pain; and low back pain.

Dr. Murati reviewed the provided medical records, took a history and conducted a physical examination. He found a decrease in sensation along the left median distribution; a positive left rotator cuff; trigger points in the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; a spastic left occipitum; a missing right hamstring reflex; a decrease in sensation along the left L5 dermatome; a S1 spinous process fracture and

a sacroiliac joint issue. Examination of the right knee revealed positive medial and lateral patella apprehension. On examination of the ankle, there was a tender ATFL on the right.

Dr. Murati diagnosed claimant with vestibular disorder; contusional left carpal tunnel syndrome; status post left shoulder diagnostic arthroscopy and left shoulder arthroscopic subacromial decompression; left shoulder arthroscopic rotator cuff repair; myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; low back pain with signs and symptoms of radiculopathy; bilateral sacroiliac dysfunction; patellofemoral syndrome of the right knee; and high right ankle sprain.

Dr. Murati assigned permanent restrictions as follows; frequently sit or drive; rarely stand, walk, bend, crouch or stoop, or climb stairs, no climbing ladders, squatting, crawling, kneeling, repetitive foot controls to the right, heavy grasping more than 40 kg with the left, above shoulder work the right or left; no lifting, carrying, pushing, or pulling more than 20 pounds occasionally and 10 pounds frequently; no frequent repetitive hand controls with the right and left; no work more than 24 inches from the body with the right and left; avoid awkward positions of the neck; use wrist splints on the left while at work or at home; avoid trunk twist; no use of hooks or knives with the left; no use of vibratory tools with the left; no lifting below knuckle height and keyboard 30 minutes on and 30 minutes off. Dr. Murati felt that claimant was in need of a sit down job.

Despite not feeling claimant was at maximum medical improvement, Dr. Murati, rated claimant, based on the *AMA Guides*, 4th Edition², as follows: for left carpal tunnel syndrome, a 10 percent left upper extremity impairment; for left shoulder status post subacromial decompression, a 10 percent left upper extremity impairment; and for loss of range of motion of the left shoulder, a 3 percent left upper extremity impairment. These were combined for a 21 percent left upper extremity impairment and converted to a 13 percent whole person impairment. For the right patellofemoral syndrome, a 5 percent right lower extremity impairment and for loss of range of motion of the right ankle, a 7 percent right lower extremity impairment. These were combined for a 12 percent right lower extremity impairment and converted to a 5 percent whole person impairment. A 2 percent whole person impairment was given for the vestibular disorder; a 5 percent whole person impairment for the myofascial pain syndrome affecting the cervical paraspinals; a 5 percent whole person impairment for the myofascial pain syndrome affecting the thoracic paraspinals; and for the low back pain secondary to radiculopathy, a 10 percent whole person impairment. The whole person impairments were combined for a 35 percent whole person impairment.

Dr. Murati reviewed the task assessment prepared by Mr. Lindahl, and determined that the claimant suffers an 80 percent task loss, having lost the ability to perform 8 out of 10 previous tasks.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., for a court ordered independent medical examination (IME) on March 20, 2012. Claimant presented with complaints of residual left shoulder pain; stiff aching pain in the posterior cervical spine and left upper back; headaches in the occipital area; sharp pain in the midline of the lumbosacral region; and sharp pain anterolaterally from the right knee down to the foot. Claimant reported the shoulder was an intermittent complaint occurring with direct pressure or weather changes. Dr. Carabetta examined claimant and diagnosed status post left shoulder resection arthroplasty; chronic cervical sprain; lumbar vertebral compression fracture, limited; post-traumatic cephalgia; and distal right lower extremity pain.

Dr. Carabetta, using the *AMA Guides*, 4th Edition, assigned a 15 percent impairment to claimant's left upper extremity at the shoulder, which converts to a 9 percent whole person impairment. Dr. Carabetta opined that the range of motion model should be avoided when considering claimant's spinal area complaints because his mobility abilities are considerably better than what he displayed on physical examination, suggestive of some degree of symptom magnification. He opined claimant has identifiable palpable muscle spasm in the subjective area of complaint. For the cervical spine, Dr. Carabetta assigned a 5 percent whole person impairment; for the lumbosacral area, a 5 percent whole person impairment; and a 5 percent whole person impairment for post-traumatic cephalgia. No impairment was provided for the right knee to the ankle. He also assigned a 5 percent whole person impairment for occipital area headaches. The whole body impairments were combined for a 22 percent whole person impairment.

Dr. Carabetta reviewed a functional capacity evaluation (FCE) that was conducted on the claimant. The FCE evaluation indicated that the claimant should have restrictions. Dr. Carabetta did not assign any restrictions because the claimant continued to work at his job. The report indicates that the claimant should have a lifting restriction of no more than 50 pounds. Dr. Carabetta stated that one of the questions is, did the claimant perform at his absolute best during the evaluation and he did not know that. What Dr. Carabetta had as a yardstick of claimant's ability is that he's still performing the job. That is why Dr. Carabetta suggested not imposing permanent restrictions, allowing the claimant to participate in the open market.

Dr. Carabetta questioned the legitimacy of claimant's medical examinations. He found claimant's test results to vary widely, depending on whether claimant was distracted or not. He described claimant as showing self-limitation,³ claimant's complaints didn't reflect a normal nerve pattern,⁴ claimant was not volitionally accurate,⁵ he found claimant's

³ Carabetta Depo. at 8.

⁴ *Id.* at 12.

⁵ *Id.* at 15.

examination suggestive of some degree of symptom magnification⁶ and Dr. Carabetta went so far as to suggest the Court take a close look at his 5 percent functional impairment given claimant for headaches.⁷

Claimant met with board certified neurological surgeon, Paul S. Stein, M.D., on January 17, 2013, at the request of respondent's counsel. Dr. Stein took claimant's history, reviewed the medical records provided and conducted a physical examination. Claimant presented with complaints of neck pain; headaches; left shoulder pain; left wrist pain; back pain; right knee pain and leg pain.

After examining claimant, Dr. Stein diagnosed claimant with left shoulder rotator cuff tears that were surgically repaired. He found claimant to be at maximum medical improvement and assigned permanent partial impairment of function as follows: for the shoulder condition based on range of motion measurements, a 15 percent left upper extremity impairment at the level of the shoulder which was converted to a 9 percent whole person impairment. For the cervical spine, a 5 percent whole person impairment for his cervical complaints. For the headaches, he found the severity could not be measured and that claimant had a tendency to symptom magnify. For the chronic pain, the claimant was given an additional 1 percent impairment, which is based on subjective information. There was no indication of structural injury to the right knee on physical examination, and further investigation would be needed. Absent that, a 5 percent impairment was assigned for a history of direct trauma, a complaint of patellofemoral pain, and crepitation. This would convert to a 2 percent whole person impairment. Although claimant had significant complaints regarding the lower back, which were noted in the treatment records, Dr. Stein stated that he could not, within a reasonable degree of medical probability, document injury to the lower back from the accident. Therefore, no impairment or restrictions were provided. As for the left wrist, Dr. Stein could not document an injury to the left wrist so no impairment or restrictions were given. The impairments combined for a 17 percent whole person impairment. All ratings were pursuant to the AMA Guides, 4th Edition.

Even though Dr. Stein rated claimant's multiple body parts, claimant was given permanent restrictions that related only to the shoulder. Those restrictions included avoiding activity with the left hand above shoulder level or more than 24 inches from the body, and avoid lifting more than 25 pounds with the left hand up to chest level. Dr. Stein noted claimant's range of motion displayed a marked decrease as compared to previous examinations. Dr. Stein stated that if the measurements are invalid and the restrictions are based upon the limits of motion, then there will be the same concerns that the claimant could actually perform more than he manifested. No restrictions were given for the cervical complaints as there was no structural injury.

⁶ *Id.*, Ex. 2 at 6.

⁷ *Id.*

Dr. Stein reviewed the task list prepared by vocational expert Steven Benjamin. Dr. Stein determined the claimant suffered a 50 percent task loss, having lost the ability to perform 10 out of 20 previous tasks. He also reviewed the task list of Doug Lindahl and determined claimant suffered an 80 percent task loss, having lost the ability to perform 8 out of 10 previous tasks.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ, in the Award, found claimant's credibility questionable at best. Dr. Carabetta questioned the legitimacy of claimant's complaints on several levels. Dr. Stein rated multiple body parts, yet only provided restrictions to claimant's surgically repaired left shoulder. The only testifying physician who did not question claimant's credibility to some degree was Dr. Murati, who diagnosed claimant with conditions not found by other doctors, some of which were not even alleged by claimant. The Board finds claimant to lack credibility in much of his testimony, and during many of his medical examinations. However, that being said, claimant did suffer physical damage as the result of an automobile accident which appeared to be fairly serious. Claimant underwent left shoulder surgery and has resulting functional impairment opinions from three health care professionals, encompassing several parts of his body.

K.S.A. 2000 Furse 44-510d(a)(13) states:

For loss of use of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 2000 Furse 44-510e defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Respondent contends claimant's functional loss is limited to his left shoulder and argues claimant's award should be limited to the 15 percent functional impairment opinion to the left shoulder of Dr. Carabetta. The Board finds claimant's functional loss extends beyond the left shoulder. While Dr. Murati's inflated opinions are not acceptable, the opinion of Dr. Carabetta is persuasive that claimant suffered permanent damage to the left shoulder, cervical spine and lumbar spine. The Board does not accept claimant's contentions of ongoing headaches, noting the serious questions raised by Dr. Carabetta. This 5 percent whole body impairment is rejected, leaving claimant with an 18 percent whole body functional impairment. The Award is modified accordingly.

K.S.A. 2000 Furse 44-510e states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

As claimant's award is not limited to a scheduled injury under K.S.A. 2000 Furse 44-510d, the Board must determine what work disability claimant is entitled to receive. This calculation requires a determination of what wage loss and what task loss claimant has suffered. The ALJ limited claimant's award to a functional impairment, finding the lack of specific information on claimant's weekly unemployment benefits prohibited an accurate calculation of the wage loss. However, claimant's receipt of unemployment benefits has no affect on claimant's wage loss. Respondent acknowledged at oral argument to the Board, it had no contrary position on this issue.

Claimant worked for respondent for over two years after the date of accident, receiving a comparable wage, when not on TTD. His last day worked was October 4, 2011, at which time his wage loss became 100 percent. Respondent cited page 610 of *Bergstrom* in support of its position. However, *Bergstrom* does not require a claimant to attempt work, or to even look for work. Once a claimant loses a job, the wage loss becomes 100 percent until subsequent employment is found and obtained. Here, claimant worked only two weeks at a job he was unable to adequately perform. Other than a brief period of employment, claimant has held no job and earned no income since his termination of employment on October 4, 2011. Under *Bergstrom* and the cases following, claimant's ability to earn wages and his efforts to locate work are irrelevant. Until claimant obtains employment, the 100 percent wage loss is absolute.

The Board must next determine what, if any, task loss claimant has suffered. Dr. Stein determined claimant's task loss, yet his restrictions were limited to the left shoulder. Dr. Murati's opinion in this matter has already been questioned by the Board, and is found to lack credibility on the task loss issue as well. Dr. Carabetta determined claimant needed no restrictions or limitations and was capable of returning to his regular job and performing it. The Board finds claimant has suffered no task loss as the result of this accident. The opinion of Dr. Carabetta remains the most persuasive.

K.S.A. 2000 Furse 44-510e mandates an average of the wage loss with the task loss. The average then becomes the appropriate work disability. With a 100 percent wage loss and 0 percent task loss, claimant's work disability calculates to 50 percent. The Award is modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant an 18 percent permanent partial disability on a functional basis, followed by a 50 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 11, 2013, is modified to award claimant an 18 percent whole person functional disability, followed by a 50 percent permanent partial general disability. The Board acknowledges claimant worked for a very brief two week period after leaving respondent's employment. While this would allow for a reduction in claimant's benefits during that two week period, with the accelerated payout currently utilized in the Kansas Workers Compensation Act, those two weeks of benefits will have little or no effect on the payout period in this matter.

Claimant is entitled to 21.14 weeks of temporary total disability compensation at the rate of \$546.00 per week, totaling \$11,542.44, followed by 73.59 weeks of benefits at the rate of \$546.00 per week, totaling \$40,180.14, for an 18 percent whole body functional disability. As of October 5, 2011, claimant is entitled to an additional 88.42 weeks of compensation at the weekly rate of \$546.00, totaling \$48,277.32, for a 50 percent permanent partial general disability, making a total award not to exceed \$100,000.00. Again, with the accelerated payout of the Act, this entire award is due and owing, and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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